SYNOPSIS OF CRIMINAL OPINIONS IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI HANDED DOWN JUNE 8, 2010

Summerall v. State, No. 2009-KA-00110-COA (Miss.App. June 8, 2010)

CRIME: Possession of weapon by a convicted felon
SENTENCE: 10 years

COURT: Forrest County Circuit Court
TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Justin Cook
APPELLEE ATTORNEY: Stephanie Breland Wood
DISTRICT ATTORNEY: Jon Mark Weathers

DISPOSITION: Reversed and rendered. Maxwell, J., for the Court. Lee and Myers, P.JJ., Griffis, Barnes, Ishee and Roberts, JJ., Concur. Irving, J., Dissents Without Separate Written Opinion. King, C.J., and Carlton, J., Not Participating.

ISSUES: (1) Whether §97-37-5 is unconstitutionally vague as it applies to possession of a "dirk knife"; (2) whether the State offered insufficient evidence that Summerall possessed a dirk knife; and (3) whether the guilty verdict is against the overwhelming weight of the evidence.

FACTS: Shauntell Summerall was convicted of possessing a dirk knife as a convicted felon. At approximately 1:15 a.m. on September 12, 2007, officers heard loud music coming for a car stereo. Summerall was standing next to the vehicle. Summerall appeared nervous and refused the officer's requests to remove his hands from his pockets. Because of safety concerns, the officer proceeded to pat Summerall down. A sheathed "fixed-blade knife" was discovered in Summerall's back right pants' pocket. At trial, two Hattiesburg police officers testified the knife at issue was a dirk knife, prohibited under §97-37-5. Both officers gave various definitions of dirk knives. During its deliberation, the jury sent a note to the circuit judge, which asked: "May we have the pages from the internet defining what a dirk knife is?" The circuit judge denied the request and the jury eventually convicted him. Summerall appealed.

HELD: Summerall challenged the statute as unconstitutionally vague and argued it does not inform those subject to it what conduct on their part will trigger criminal liability. §97-37-5 explicitly prohibits convicted felons from possessing dirk knives. A statute is not rendered unconstitutionally vague merely because its words or terms are not specifically defined. Given that Summerall failed to demonstrate an individual of ordinary intelligence would not comprehend the prohibited conduct, the Court found the issue without merit.

==> However, the Court found the evidence was insufficient to conclude Summerall possessed a dirk knife. The Court extensively reviewed various definitions of dirk knifes from several different jurisdictions and dictionaries. A photograph of the knife in question was also included in the opinion. Summerall's knife was about 8 inches long, but the blade was only 4 inches. It had one sharpened edge and one blunt edge.

==>Under traditional definitions, Summerall's knife lacked "dagger-like characteristics." Under modern definitions, there was no indication that the knife was suitable primarily or exclusively for stabbing. Considering both the traditional and modern tests for dirks and dirk knives, the Court found the knife at issue is not prohibited by Mississippi law.

==> "To provide further guidance to law enforcement, prosecutors, and citizens of Mississippi, we draw from established precedent and both the traditional and modern views and hold that to qualify as a dirk knife, the weapon must: (1) have a blade with at least one sharpened edge which tapers to a point and (2) be designed primarily for use as a stabbing weapon. We decline to expand the reach of section 97-37-5 to prohibit the possession of all fixed-blade knives of certain length as restraint dictates that broader application would require legislative action."

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO63863.pdf

Patterson v. State, No. 2009-KA-00076-COA (Miss.App. June 8, 2010)

CRIME: Possession of cocaine and possession of a weapon by a convicted felon
SENTENCE: 16 years for the cocaine, 10 years for the weapons charge, consecutively as an habitual offender

COURT: Coahoma County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Leslie Lee
APPELLEE ATTORNEY: Jeffrey A. Klingfuss
DISTRICT ATTORNEY: Laurence Y. Mellen

DISPOSITION: Affirmed. Carlton, J., for the Court. King, C.J., Lee and Myers, P.JJ., Irving, Griffis, Barnes, Ishee, Roberts and Maxwell, JJ., Concur.

ISSUE: Whether the verdict was against the overwhelming weight of the evidence.

FACTS: Nicky Alonzo Patterson was convicted of possessing cocaine on the night of October 30, 2007, in Clarksdale. Two officers were patrolling an area of town with high levels of drug activity. They observed a Nissan pull over and park illegally on the left side of the road. They observed a female exit a residence and walk to the Nissan's driver's side door. The female reached inside the Nissan, through the window, at which time both officers witnessed a "hand-to-hand transaction" between the driver and the female. As the officers approached the Nissan, the female ran back inside her residence. The officers exited their car approached the Nissan on foot, and Patterson, who was driving the Nissan, immediately exited the vehicle. Both officers saw Patterson drop something between the officers' car and the Nissan. One officer noticed a Ruger 9mm semi-automatic handgun on the passenger floorboard of the car. Patterson was instructed to place his hands on the car to allow the officers to conduct a pat-down search of Patterson. Instead, Patterson fled. Patterson was caught and officers found a small plastic bag containing what appeared to be powder cocaine on the ground near the car. The plastic bag was later determined to contain 6.2 grams of cocaine. Patterson

claimed he was only picking up a women he had recently met. He fled because he believed her jealous boyfriend had arrived. His girlfriend testified the gun belonged to her and that she inadvertently left it in the car after borrowing the car from Patterson.

HELD: The verdict was not against the weight of the evidence. Both officers saw Patterson drop something where cocaine was later found. Patterson fled when he saw the officers. Officers saw the gun in plain view on the floorboard of Patterson's car. The jury could surmise that Patterson knew of the handgun's presence in his vehicle. The jury resolves conflicts in evidence.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62269.pdf

Banks v. State, No. 2009-KA-00070-COA (Miss.App. June 8, 2010)

CRIME: Robbery
SENTENCE: 12 years

COURT: Coahoma County Circuit Court
TRIAL JUDGE: Hon. Albert B. Smith, III

APPELLANT ATTORNEY: Ben Suber, David Tisdell
APPELLEE ATTORNEY: Deirdre McCrory, John Henry
DISTRICT ATTORNEY: Laurence Y. Mellen

DISPOSITION: Affirmed. Ishee, J., for the Court. King, C.J., Lee and Myers, P.JJ., Irving, Griffis, Barnes, Roberts and Maxwell, JJ., Concur. Carlton, J., Not Participating.

ISSUE: Whether the identification process used to identify Banks was so impermissibly suggestive that he suffered irreparable misidentification.

FACTS: Ronson Banks was convicted of robbery and sentenced to 12 years. On December 12, 2006, Elizabeth Cohens was walking home from her job when she met an individual in the street who spoke to her. Cohens testified that she heard someone running behind her, turned, and then felt a gun being pressed against her back by a man. She further testified that the man demanded she give him her backpack and cell phone. After the robbery, Cohens walked across the street and called for help. The police arrived shortly thereafter, and Cohens gave a description of her attacker, including that he had been drinking from a Burger King cup. Shortly thereafter, officers stopped a man who fit the description. The man was also in possession of a Burger King cup. After being apprehended by officers, the man, later identified as Banks, was shown to Cohens, and she identified him as the one who had robbed her. Banks admitted to police that he took Cohens's backpack, but he claimed that he did not have a gun.

HELD: Banks's claim that the show-up identification was unfairly suggestive is procedurally barred for failing to raise the issue at trial. Notwithstanding the bar, the claim is without merit. Banks admitted that he took Cohens's backpack. The only issue at trial was whether or not he used a weapon when he took the backpack. His identity was simply not an issue.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62872.pdf

Trejo v. State, No. 2008-KA-02133-COA (Miss.App. June 8, 2010)

CRIME: Possession of cocaine with intent to sell
SENTENCE: 60 years as an habitual offender

COURT: Madison County Circuit Court
TRIAL JUDGE: Hon. Samac S. Richardson

APPELLANT ATTORNEY: Hunter Aikens
APPELLEE ATTORNEY: Laura Hogan Tedder
DISTRICT ATTORNEY: Michael Guest

DISPOSITION: Reversed and rendered. Barnes, J., for the Court. King, C.J., Lee and Myers, P.JJ., Griffis, Ishee, Roberts and Maxwell, JJ., Concur. Irving, J., Dissents Without Separate Written Opinion. Carlton, J., Not Participating.

ISSUE: Whether the circuit court erred in denying Trejo's motion to suppress for lack of probable cause to stop his vehicle.

FACTS: At approximately 1:00 a.m. on January 21, 2005, David Trejo and his passenger, Pebbles Nutt, were traveling north on I-55 between Madison and Canton. Trejo's red Chevrolet SUV bore a Texas license plate. Trejo was traveling in the left-hand lane at a speed of 60 mph. The maximum posted speed limit was 70 mph and the minimum was 45 mph. Sergeant Chris Picou began following Trejo, and flashed his high-beam lights into Trejo's vehicle to get Trejo to move into the right-hand lane so that he could pass. There was no traffic in the right lane. The police report indicated that Trejo moved into the right lane after the third time the officer flashed his high-beam lights. However, Sgt. Picou testified that Trejo did not move over until he activated his blue lights. Upon the officer's activation of the blue lights, Trejo immediately pulled over. Sgt. Picou questioned Trejo and Nutt about their destination. Trejo presented a valid driver's license and proof of insurance and informed the officer that the couple was traveling from Houston, TX, to Ohio. Trejo and Nutt appeared to be sleepy and nervous and a strong odor of air freshener was coming from the vehicle. After a criminal history check, it was discovered that Trejo had been previously convicted of drug offenses, but only told the officer he had been arrested for stealing a car several years ago. Trejo refused to consent to a search of the car. Sgt. Picou informed Trejo that he was going to run his drug dog around the car, and he asked Nutt to exit the vehicle. Picou then noticed a bulge underneath her shirt in her midsection. He frisked her and recovered four packages of cocaine.

HELD: At the suppression hearing, Sgt. Picou admitted that Trejo had not violated any traffic law, nor was Trejo operating the vehicle in an erratic manner. The officer claimed that the stop was made over (1) concern that Trejo may have been tired or intoxicated; (2) the fact that Trejo had a Texas license plate; and (3) Trejo's failure to respond to the officer's attempts to move him into the right lane of traffic, coupled with his reduced rate of speed. The circuit court found that the officer had

probable cause to stop Trejo for safety reasons, based upon the fact that he was traveling in the left-hand lane and failed to respond to the officer's flashing high-beam lights. The circuit court intimated that Trejo lacked standing to object to the evidence as the drugs were found on Nutt, not in the vehicle. The trial judge erred in failing to grant the motion to suppress.

==> First, Trejo had standing to object to the search of his passenger. If the initial traffic stop was a violation of Trejo's constitutional right under the 4th Amendment, the cocaine is the fruit of that illegal seizure, and Trejo, as driver of the vehicle, has standing to assert the violation.

==>The record does not demonstrate that Sgt. Picou ever suspected Trejo of any traffic violation. Picou merely testified that he had a "concern" that Trejo may have been tired or intoxicated. “We find that the officer's suspicion that Trejo was tired or impaired is not sufficient to constitute a reasonable basis for the traffic stop.”

==> It was additionally argued at the suppression hearing that Trejo may have violated statutory authority which requires slower traffic to remain in the right lane of the highway. However, both the officer and the circuit court judge acknowledged that the traffic signs were merely advisory and that no statute prohibited Trejo from driving in the left lane.

==>On appeal, the State claimed Trejo violated §63-3-603(d), which requires "vehicle[s] proceeding at less than the normal speed of traffic" to be driven in the right-hand lane if available for traffic. Trejo was driving 10 miles below the speed limit and 15 mph above the minimum speed of 45 mph. There is no evidence that Trejo was traveling at less than the normal speed of traffic at the time and place he was stopped. “The mere fact that Officer Picou came upon him at a higher rate of speed does not mean that Trejo was traveling at less than the normal rate of speed.”

==>The circuit court erred in refusing to suppress the cocaine. Without the cocaine, there is no remaining evidence to uphold Trejo's conviction. The case is reversed and rendered.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO63800.pdf

Johnson v. State, No. 2009-KP-00048-COA (Miss.App. June 8, 2010)

CRIME: Attempted Aggravated Assault and Possession of a weapon by a felon
SENTENCE: Life on both counts concurrently as an habitual offender

COURT: Coahoma County Circuit Court
TRIAL JUDGE: Hon. Charles E. Webster

APPELLANT ATTORNEY: Michael K. Johnson (Pro Se)
APPELLEE ATTORNEY: John R. Henry, Jr.
DISTRICT ATTORNEY: Laurence Y. Mellen

DISPOSITION: Affirmed. King, C.J., for the Court. Lee and Myers, P.JJ., Irving, Griffis, Barnes, Ishee, Roberts, Carlton and Maxwell, JJ., Concur.

ISSUES: (1) Whether his indictment was defective, (2) whether he received ineffective assistance of counsel, (3) whether the trial court erred by denying his motion for a directed verdict, (4) whether the trial court erred by denying his motion for a new trial, and (5) whether there was cumulative error.

FACTS: On March 20, 2008, Michael K. Johnson had an altercation with Russell Sanders, a co-worker, while on the job. After work, Sanders and three other co-workers got into the car to go home. They saw Johnson standing across from their car in the parking lot. They all saw Johnson raise a gun, point it toward their car, and fire the gun. Johnson then fled. Police found a single gunshot to the driver's side door of the car. A bullet was lodged in the door seal, and a nine-millimeter shell casing was found near the vehicle.

HELD: . First, Johnson argues that, in the habitual portion of his indictment, the State failed to set forth the dates of sentencing for his prior convictions. The issue is barred for failing to raise the claim at trial. Regardless, the indictment was in compliance with Rule 11.03(1) and sufficiently charged him as a habitual offender. There is no requirement that the indictment include the dates of sentencing.

==>Next, Johnson argues that the indictment erroneously charged him as a habitual offender under both §99-19-83 and §99-19-81. Again, this is procedurally barred for failing to raise the issue at trial. The claim is also without merit. It is clear that the State charged Johnson as a habitual offender under §99-19-83. §99-19-81 was clearly listed as an alternative. Johnson's previous felony convictions were for manslaughter and aggravated assault. Regardless, it is not necessary for the State to specify in the indictment which section of the habitual criminal statute they were proceeding under.

==>Johnson was not denied effective assistance of counsel. Johnson claimed his trial counsel allowed him to be sentenced to a life sentence by a judge rather than by a jury; his trial counsel lied to him; his trial counsel did not allow him to review discovery; his trial counsel failed to object to his allegedly defective indictment; and he told the trial court that he did not want his counsel to represent him. The parties did not stipulate that the record is adequate to consider the issue on direct appeal.

==>Johnson next alleged that the State wrongfully charged him with attempted aggravated assault when it should have charged him with shooting into a motor vehicle, and that the State did not satisfy the intent element of attempted aggravated assault. It is within the prosecutor's discretion to decide what charge to bring against a criminal defendant. The State simply had to prove that Johnson attempted to cause bodily injury to Sanders with a deadly weapon. A reasonable jury could have concluded that Johnson intended to cause bodily injury to Sanders by using a deadly weapon. Also, the verdict was not against the weight of the evidence.

==>There was no error, much less cumulative error in Johnson's case.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62126.pdf

Seal v. State, No. 2008-KA-01424-COA (Miss.App. June 8, 2010)

CRIME: 2 counts culpable-negligence manslaughter
SENTENCE: 20 years on each count to run concurrently

COURT: Sunflower County Circuit Court
TRIAL JUDGE: Hon. Margaret Carey-McCray

APPELLANT ATTORNEY: Rabun Jones, Gaines S. Dyer
APPELLEE ATTORNEY: Lisa Lynn Blount
DISTRICT ATTORNEY: Willie Dewayne Richardson

DISPOSITION: Denial of Motion for a Reduction of Sentence affirmed. King, C.J., for the Court. Lee and Myers, P.JJ., Irving, Griffis, Barnes, Ishee, Roberts, Carlton and Maxwell, JJ., Concur.

ISSUES: (1) Whether the trial court error in failing to grant Seal's motion for reduction of sentence after a guilty plea imposed during vacation, and (2) whether the trial court erred in refusing to consider his motion to reduce Seal's sentence a PCR.

FACTS: Stephen E. Seal a/k/a Bo Seal pled guilty to two counts of culpable-negligence manslaughter and was sentenced to 20 years on each count. On March 6, 2006, Seal got off work and smoked some marijuana. He and a friend then purchased a muzzle-loader rifle and went to another friend's home. Laurie Thomas was visiting when Seal arrived. Seal took his recently-purchased rifle into the house to show it off. Seal began waving the rifle around making a noise as if he were firing the rifle. Thereafter, Seal's friend handed him a pistol, and Seal began to wave the pistol around in the same manner as he had previously done with the rifle. While waving the pistol around, Seal pulled the trigger, and a bullet from the pistol struck Thomas in her forehead. Thomas and her unborn child subsequently died as a result of their injuries. Within 5 days of Seal's guilty pleas and sentences, the trial judge informed defense counsel and the DA that after reflecting upon Seal's sentences, she believed that some of the time imposed should have been suspended. However, because the sentences were imposed during a vacation term, she did not have the authority to amend them. Seal filed a motion for reduction of sentence. The trial judge denied the motion and refused a request to consider it a PCR. Seal appealed.

HELD: The trial court's judgment that it did not have proper jurisdiction to amend Seal's sentence was not in error. A reduction or reconsideration of a sentence by a judge must occur prior to the expiration of the sentencing term. However, at the time of Seal's plea, he did have the right to a direct appeal of his sentence pursuant to a guilty plea.

==>The trial judge denied Seal's request to treat his motion as a PCR after Seal had already filed a notice of appeal. Seal did not amend the notice of appeal to include this ruling, therefore the COA did not have jurisdiction to consider it. The issue is dismissed without prejudice to Seal's right to pursue a proper motion for post-conviction relief should he choose to do so.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62123.pdf

Warden v. State, No. 2009-CP-00639-COA (Miss.App. June 8, 2010)

CRIME: PCR – Possession of methamphetamine and possession of two or more precursor chemicals with the intent to manufacture methamphetamine
SENTENCE: 20 years on each count to run concurrently

COURT: Forrest County Circuit Court
TRIAL JUDGE: Hon. Robert B. Helfrich

APPELLANT ATTORNEY: Lonnie Lee Warden (Pro Se)
APPELLEE ATTORNEY: W. Glenn Watts

DISPOSITION: Dismissal of PCR affirmed. Carlton, J., for the Court. King, C.J., Lee and Myers, P.JJ., Irving, Griffis, Barnes, Ishee, Roberts and Maxwell, JJ., Concur.

ISSUES: Whether the trial judge erred in treating Warden's motion to reduce his sentence as a PCR and summarily dismissing it for failure to state a proper post-conviction claim.

FACTS: Lonnie Lee Warden pled guilty in June of 2004 to one count of possession of methamphetamine and one count of possession precursors with the intent to manufacture methamphetamine. Two years later, Warden filed a pro se motion requesting the trial court to review and reduce his sentence. Warden argued that he received excessive sentences, especially when compared with the sentences of other first-time drug offenders. The circuit court then treated Warden's motion as a PCR and summarily dismissed Warden's motion. Warden appealed.

HELD: The trial judge possesses no authority to reduce a sentence two years after the conviction was entered and the sentence imposed. Despite Warden's argument that similarly situated first-time drug offenders received less onerous sentences, Warden's sentences constituted legal sentences falling within the minimum and maximum sentences authorized by statute.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO62130.pdf

Also of Note:

Rochell v. State, No. 2008-CP-01730-COA (Miss.App. June 8, 2010)

CRIME: Murder and Arson
SENTENCE: Life and a concurrent 20 years

COURT: Hinds County Circuit Court
TRIAL JUDGE: Hon. Winston L. Kidd

APPELLANT ATTORNEY: Arvin D. Rochell (Pro Se)
APPELLEE ATTORNEY: Jane L. Mapp

DISPOSITION: Dismissal of complaint with prejudice affirmed. King, C.J., for the Court. Lee and Myers, P.JJ., Irving, Griffis, Barnes, Ishee, Roberts, Carlton and Maxwell, JJ., Concur.

ISSUES: (1) How many members are required to constitute the Parole Board under §47-7-5(1), (2) is there a limit on how many times a violent offender can be denied parole, (3) what is the legislative intent behind requiring the parole board to predict the length of incarceration necessary before the offender can be successfully paroled, (4) does the Legislature intend for an offender to be denied parole based on erroneous information contained in his parole file; and why are there not any procedures to allow an offender to correct erroneous information in his file, and (5) whether the trial court erred by denying Rochell's motion for a preliminary injunction, requesting that he receive a new parole hearing.

FACTS: Arvin Dale Rochell pled guilty on January 11, 1994, in Calhoun County to charges of murder and arson. He was sentenced to serve life for murder, and he was sentenced to serve twenty years for arson. After voluntarily dismissing a federal compliant, Rochell filed a complaint against the State in Hinds County, asking the trial court to interpret parole statutes and to determine whether the statutes are unconstitutional. On November 19, 2008, the trial court issued an order dismissing Rochell's complaint with prejudice. Rochell appealed.

HELD: Rochell argued that all five members of the Parole Board should have been present at his hearing and only three board members were present. §47-7-13 only requires three members to approve parole. The rest of Rochell's issues fail to state a constitutional claim sufficient for the trial court to assert jurisdiction. Because the trial court lacked jurisdiction to consider Rochell's claims, it did not err by dismissing Rochell's complaint.

==>Rochell filed a motion for a preliminary injunction against the Parole Board during the litigation. Rochell argued that the Parole Board violated his 14th Fourteenth Amendment rights by arbitrarily denying him parole in retaliation for this lawsuit. The record indicates the Parole Board denied Rochell parole based on (1) the serious nature of the offense, (2) the number of offenses committed, (3) his police record, (4) community opposition, and (5) insufficient time served. These are areas which the Parole Board has authority to consider in §47-7-17. Nothing in the record supports Rochell's claim that the Parole Board arbitrarily denied him parole in violation of any 14th Amendment right.

To read the full opinion, click here:
http://www.mssc.state.ms.us/Images/HDList/..%5COpinions%5CCO61896.pdf